In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 640

CLEONA HOOPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. A11) is not yet reported. The opinion of the district court is not reported (Pet. A2–A10).

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1970. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including August 30, 1970. The petition was not filed until September 1, 1970, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

406-673—70

QUESTIONS PRESENTED

1. Whether petitioner's motion to suppress testimony of government agents on the ground that the content of their testimony derived from a trespass on his property was properly denied.

2. Whether the federal statutory scheme relating to liquor creates hazards of incrimination which authorize the invocation of the privilege against self-incrimination as a complete defense to prosecution under one of its provisions.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner and co-defendant Williamson were convicted of possession of liquor in violation of 26 U.S.C. 5686(a) (Pet. A1). Petitioner was sentenced to five years' probation. The court of appeals affirmed (Pet. A11).

The evidence showed that government undercover agent William Reece made contact with co-defendant Williamson on February 24, 1969 and arranged to purchase non-tax paid whiskey from him (R. 19, Pet. A4). The next day, agent Reece met Williamson and they drove, at Williamson's direction, to petitioner's residence to obtain the whiskey. Reece did not know that this was the place at which the deal was to be consummated (R. 21–22, Pet. A5). Unbeknownst to Williamson, federal agents Riddle and Whitlow were secreted in the trunk of the automobile.

When they arrived at petitioner's residence, Williamson went to talk to someone in the house (R. 22).

He returned to the car and waited a few minutes until petitioner arrived (R. 23). Petitioner directed Williamson to back the car up to the porch, where the 15 cases of whiskey to be purchased were located (R. 23–24). Reece examined the cases and paid Williamson $216 (R. 27). He then opened the trunk, releasing the other agents, and announced that petitioner and Williamson were under arrest (R. 26).

ARGUMENT

1. Petitioner contends that the testimony of the federal agents should have been suppressed because it was based on an unlawful trespass on his premises. As the district court pointed out in its thorough opinion denying the motion to suppress, this contention is without merit. As the district court stated (Pet. A 8–9):

> There is evidence here from which the reasonable inference may be drawn that Messrs. Williamson and Hooper had associated themselves together * * * with the intent knowingly to sell unlawfully 90 gallons of tax-unpaid whiskey, *before* Mr. Williamson knowingly brought their customer Mr. Reece to the Hooper premises. * * * Thus, the act of Mr. Williamson in knowingly bringing Mr. Reece upon the premises of Mr. Hooper (even without the latter's knowledge) during the continuance of this common plan or arrangement, and in furtherance of an intended object or purpose of the plan or arrangement, was the act of his

partner Mr. Hooper, *United States* v. *United States Gypsum Co.* (1948), 333 U.S. 364, 393. * * * [1]

Moreover, where premises are open to customers for a business purpose the Fourth Amendment is not violated by the mere fact that a customer who is an agent does not disclose his identity as such. *Lewis* v. *United States*, 385 U.S. 206.[2]

2. The contention that compliance with the liquor laws would violate the privilege against self-incrimination [3] is without merit. The statutory provisions are aimed at regulating lawful activity and are not directed at those inherently suspect of criminal conduct. All the courts of appeals which have dealt with the issue have uniformly rejected the claim that the privilege provides a defense for failure to comply with these provisions. *E.g., United States* v. *Fricano*, 416 F. 2d 434 (C.A. 2); *United States* v. *Hunt*, 419 F. 2d 1 (C.A. 3), certiorari denied, 397 U.S. 1016; *United States* v. *Walden*, 411 F. 2d 1109 (C.A. 4), certiorari denied, 396 U.S. 931; *United States* v. *Dryden*, 423 F. 2d 1175 (C.A. 5), certiorari denied, 398 U.S. 950; *United States* v. *Whitehead*, 424 F. 2d 446 (C.A. 6).

[1] This case is thus unlike *United States* v. *Cook*, 213 F. Supp. 568 (E.D. Tenn.), relied upon by petitioner (Pet. 6–7), where the agents did not come upon the premises in the company of an associate in the illegal venture.

[2] The presence of the two officers in the trunk of the automobile was irrelevant since, as the district court pointed out (Pet. A 4–8), they were there primarily to protect agent Reece and acquired no knowledge of the violation which Reece had not acquired.

[3] Petitioner raises the same issue in a petition for certiorari in No. 620, this Term. The contention is also posed in the petition in *Grooms* v. *United States*, No. 639, this Term.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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CERTIORARI DENIED N.C.R.

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